

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 181

WILLIAM L. CHESBROUGH AND MILDRED J. CHES-
BROUGH,

Petitioners,

vs.

THE WESTERN AND SOUTHERN LIFE INSURANCE
COMPANY AND W. LEE SCHIELD, SUPERINTENDENT OF
INSURANCE OF THE STATE OF OHIO.

REPLY BRIEF OF PETITIONERS

Petitioners would not ordinarily burden the court with a reply brief, but some of the statements contained in respondents' brief are so improper and contrary to the facts that we feel it to be our duty to call those matters to the court's attention. At page 6 and 7 respondents make certain statements about things happening long after this case was tried. We have been suffering under the delusion that a reviewing court is somewhat committed to consider and decide cases upon the record before it. We are, therefore, at a disadvantage in getting into a controversy with respondents over these arguments which they make as to what

happened recently and long after the record was made up. We would not object strenuously to a departure, by respondents, from controlling rules if it were not for the fact that they seek to insinuate that mutualization is an accomplished fact. In other words, they would have your honors feel that you need not bother with deciding this case because they have already decided it for you. They, in effect, tell the court that they have taken \$42,000,000.00 of policy holders' money and since they did that before the court had a chance to decide upon it that makes it an accomplished fact and can no longer be reviewed by a court. Somehow, we feel that this court will not be misled by such arguments.

At page 8 respondents state that the attack on Section 9364-8 is premature, anticipatory and frivolous. They further state that "the parties agree that each member of the mutualized corporation has a vote and the constitutional question is purely academic." The record discloses that following Section 9364-8, 86 per cent of the policies were excluded from the right to vote on a code of rules and regulations. The record shows that this code excludes 86 per cent of the policies from ever voting on anything in connection with this corporation. In the face of such a record, respondents must be very brazen to argue as they do, and to claim that they are going to give all policy holders a vote in the future when, as a matter of fact, the statute disfranchises 86 per cent, and the respondents have already adopted a code regulating the company in the future by a majority of 14 per cent, and in the code have *included a rule which forever, in the future, excludes 86 per cent of the policies from ever voting.*

The importance of giving policy holders the right to vote, the number or percentage of votes as compared to the number of policy holders, is shown in a table contained in the Investigation of Concentration of Economic Power, Monograph number 28 at page 16.

	Estimated number of policy-holders	Number of possible votes
1. Metropolitan.....	27,111,000	24,821,000
2. Prudential.....	21,300,000	12,200,000*
3. New York Life.....	2,000,000	1,850,000
4. Equitable.....	1,149,500	1,072,000
5. The Mutual of New York.....	865,000	805,000
6. Northwestern.....	635,000	635,000
7. John Hancock.....	5,170,000	5,250,000
8. Penn Mutual.....	367,674	1,651,678
9. Mutual Benefit.....	364,004	Not supplied
10. Massachusetts Mutual.....	363,696	486,000
11. New England Mutual.....	253,950	278,500
12. Provident Mutual.....	189,000	189,000
Western and Southern Life Insurance Com- pany.....	2,700,000	700,000

* All policy holders under 21 years of age have no vote.

In connection with this investigation by the Temporary National Economic Committee in a study made under the auspices of the Securities and Exchange Commission, in which Justice Douglas, now a member of this court, participated, the president and chief stockholder of the respondent was giving testimony and at page 91, of the same booklet, the following is quoted: "Mr. Charles F. Williams, president of the Western & Southern, testified as follows:

'Mr. Gesell: Have you or any of the other principal officers or controlling stock holders had business relations with the company through outside affiliations of any sort?

'Mr. Williams: Never.

'Mr. Gesell: You have confined your business activities to the operation of the insurance company?

'Mr. Williams: That is right.

'Mr. Gesell: Is it your feeling that officers and directors should not deal with their own company, even when it is a stock company?

'Mr. Williams: I don't see how they can do it. No, of course not.

'Mr. Gesell: You think it is undesirable for that situation to exist?

'Mr. Williams: Yes, yes; it is even worse than undesirable.' "

It seems as though it makes a difference where the officers and stock holders can draw out \$42,000,000.00. Then, apparently, it is perfectly proper for them to deal with themselves for their own advantage, and petitioners, representing 5 policies and claiming to represent all other policy holders, are opposed in their request for a review by the courts of such action, and are opposed when they ask a declaratory judgment seeking to have the rights of the policy holders determined in a judicial proceeding.

We respectfully submit that the brief of respondents is misleading, is based on misstatements of facts and statements of facts which are not in the record, and that a writ of certiorari should be issued in this case.

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